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Letter dated 3 March 2003 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council

I write with reference to my letter of 12 April 2002 (S/2002/452).

The Counter-Terrorism Committee has received the attached third report from South Africa, submitted pursuant to paragraph 6 of resolution 1373 (2001) (see annex).

I would be grateful if you could arrange for the present letter and its annex to be circulated as a document of the Security Council.

(*Signed*) Jeremy **Greenstock**
Chairman
Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism

03-27549 (E) 170303

Annex

Note verbale dated 30 January 2003 from the Permanent Representative of South Africa to the United Nations addressed to the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism

The Permanent Representative of the Republic of South Africa to the United Nations presents his compliments to the Chairperson of the Security Council Committee established pursuant to resolution 1373 (2001) and has the honour to respond to the points raised in the latter's letter dated 30 October 2002 (see enclosure). The enclosure constitutes the third report of the Government of South Africa on the steps taken to implement resolution 1373 (2001).

Enclosure

REPLY TO THE LETTER DATED 30 OCTOBER 2002 RECEIVED FROM THE COUNTER-TERRORISM COMMITTEE CONTAINING COMMENTS ON SOUTH AFRICA'S SUPPLEMENTARY REPORT SUBMITTED PURSUANT TO PARAGRAPH 6 OF SECURITY COUNCIL RESOLUTION 1373 (2001)

Introduction

The South African Government is concerned about perceptions that are created by unsubstantiated statements or advisories by other Governments and the media regarding the potential of terrorist activities in third countries. Such unsubstantiated and selective statements or advisories could not only negatively impact on a country's standing, but also on its security situation. There is a danger that terrorists and terrorist organisations may either exploit such statements or advisories, or may view these as providing indications of opportunities to conduct terrorist activities.

The South African Government therefore calls on the United Nations Security Council to bring these concerns to the attention of the Member States of the Organisation and to impress upon their Governments the need to act responsibly when dealing with such sensitive issues that hold potentially serious consequences. States should desist from issuing general warnings and other statements including travel advisories about unsubstantiated threats of terrorism in other countries. In instances where States obtain information about potential terrorist activities, it is essential for the Governments of those States to alert the Governments of the States where the potential terrorist activity is to take place rather than proceeding to issue a statement or travel advisory without any such consultation. Prior and confidential consultation would allow the States concerned to firstly verify the information and to take the necessary steps to prevent and act against the terrorist threat. The objective here should be to prevent and combat terrorism without creating a climate of fear and insecurity.

The South African Government believes that terrorism is an extremely serious challenge confronting the international community as a whole, which requires all countries to co-operate and work together in order to successfully combat this threat to international peace and security.

Situations where terrorists and terrorist organisations are supported by countries, or where their territories are used as bases of operation, need to be addressed in accordance with the provisions of international law, including the relevant decisions of the United Nations Security Council.

1. Implementation Measures

Question 1

The CTC would welcome:

a) A progress report on the preparation and enactment of the proposed Anti-Terrorism Bill, including, in particular, an indication, as soon as practicable, of the availability of the text of the Bill on the website of the South African Parliament: and

b) A progress report on the implementation of the Financial Intelligence Centre Act, 2002.

Anti-Terrorism Bill

The South African Law Commission officially handed its report on the Anti-Terrorism Bill, to the Minister for Justice and Constitutional Development on 29 August 2002. On 26 September 2002, the Minister for Justice requested the Minister

for Safety and Security to consider the Bill and to submit it to Cabinet, with a view to introducing it in Parliament as soon as possible.

Cabinet approved the Bill for introduction to Parliament in November 2002. The Bill is scheduled to be on the parliamentary programme at the beginning of the 2003 session. The Bill will only be available on the parliamentary website, once it is introduced in Parliament.

The Bill is presently available at:

a) The South African Law Commission's website at:
http://www.server.law.wits.ac.za/salc/report/report.html

b) Unwembi's Resource of South African Government Information at:
http://www.polity.org.za/govdocs/bills/2002/index.html

c) The South African Police Service's website at:
http://www.saps.org.za/legis/index.htm#anti-terror

d) The South African Parliament's website at:
http://www.pmg.org.za/bills/020902terrorismbill.htm

Financial Intelligence Centre Act

The Current position concerning the implementation of the Financial Intelligence Centre Act, 2001 ("the Financial Intelligence Centre Act") is as follows:

Draft regulations to support the operation of the Financial Intelligence Centre Act have been submitted to the Minister of Finance. These were referred by the Minister to the Money Laundering Advisory Council in accordance with the consultative process prescribed in section 77 of that Act. Subsequent to receiving the Council's comments, the Minister promulgated the regulations by notice in the Government Gazette on 20 December 2002. The Regulations were published in Government Gazette number 24176 of 20 December 2002 under Government Notice R1595. They are also available on the website of the National Treasury at:
http: www.treasury.gov.za/legislation/acts/fic/draft_regs.pdf

The regulations, together with the corresponding provisions of the Financial Intelligence Centre Act will take effect in two stages during 2003. It is envisaged that the sections of the Financial Intelligence Centre Act which deal with the reporting of suspicious and unusual transactions, together with the supporting regulations, will commence during February 2003. The Financial Intelligence Centre aims to start functioning in an operational capacity at the same time. It is envisaged further that the sections of the Act which deal with money laundering controls (such as client identification, record-keeping and implementation of internal rules), together with the supporting regulations, will commence during June 2003.

The text of the Financial Intelligence Centre Act is available on the website of the National Treasury at:
http://www.treasury.gov.za/legislation/acts/fic/default.htm

Schedule 1 (the list of Accountable Institutions), Schedule 2 (the list of Supervisory Bodies) and Schedule 3 (the list of Reporting Institutions) of the Financial Intelligence Centre Act came into operation on 1 March 2002.

In order to address the combating of terrorism, amendments to the Financial Intelligence Centre Act are proposed in the Schedule to the Anti-Terrorism Bill.

Question 2

The scenarios set out in paragraphs 22 to 25 of the response in the supplementary report to the first question raised in the letter of 15 April 2002 in relation to sub-paragraph 1 (a) of the Resolution do not appear to be dealt with in the text of the Financial Intelligence Centre Bill that is currently available on the website of the South African Parliament. Are there provisions dealing with those scenarios in the Financial Intelligence Centre Act, 2001, as finally enacted (which has not been posted on the website), or is it proposed that provisions of that kind be inserted in that Act by the Anti-Terrorism Bill?

The following is an extract from section 29 of the Financial Intelligence Centre Act, which contains the duty to report suspicious and unusual transactions:

Quote

Suspicious and unusual transactions

29. (1) A person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or suspects that:

(a) the business has received or is about to receive the proceeds of unlawful activities;

(b) a transaction or series of transactions to which the business is a party:

(i) facilitated or is likely to facilitate the transfer of the proceeds of unlawful activities;

(ii) has no apparent business or lawful purpose;

(iii) is conducted for the purpose of avoiding giving rise to a reporting duty under this Act; or

(iv) may be relevant to the investigation of an evasion or attempted evasion of a duty to pay any tax, duty or levy imposed by legislation administered by the Commissioner for the South African Revenue Service; or

(c) the business has been used or is about to be used in any way for money laundering purposes, must, within the prescribed period after the knowledge was acquired or the suspicion arose, report to the Centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions.

(2) A person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or suspects that a transaction or a series of transactions about which enquiries are made, may, if that transaction or those transactions had been concluded, have caused any of the consequences referred to in subsection (1)*(a)*, *(b)* or *(c)*, must, within the prescribed period after the knowledge was acquired or the suspicion arose, report to the Centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions.

Unquote

The scenarios referred to in paragraphs 22 to 25 of the response in the supplementary report to the first question raised in the letter of 15 April 2002 in relation to sub-paragraph 1 (a) of the Resolution are provided for in subsections (1)(b) and (1)(c) of section 29 of the Financial Intelligence Centre Act, 2001. A link to the text of the Financial Intelligence Centre Act, 2001, is available on the web page of the Financial Intelligence Centre at the following address:
http://www.treasury.gov.za/legislation/acts/fic/default.htm

Amendments to the *Financial Intelligence Centre Act* to combat terrorism are proposed in the *Anti-Terrorism Bill*. See the Schedule to the *Bill*.

Generic provisions are included in the *Anti-Terrorism Bill*. Clause 4(4) provides, *inter alia*, that the Minister may by notice in the *Gazette* declare an organisation to be a proscribed organisation, if he or she is satisfied on reasonable grounds that the declaration is reasonably appropriate to give effect to a decision of the Security Council of the United Nations that the organisation is an international terrorist organisation.

Question 3

In response to the questions in the letter of 15 April 2002 relating to the use of lists of terrorists and terrorist organisations, the supplementary report indicates that action has been taken on the basis of the lists obtained from the UN Security Council Sanctions Committee on Afghanistan but the view is taken that 'it is not clear whether these lists would suffice for the identification or targeting of terrorists and terrorist organisations/entitles for purposes of implementing paragraph 1 ... comprehensively'. The CTC agrees that reliance on those lists for those purposes is not entirely satisfactory and would be grateful for an indication whether consideration has been given to including in the proposed Anti-Terrorism Bill provisions that would give effect to paragraph 1 generically rather than by reliance on lists.

Generic provisions have been included in the Anti-Terrorism Bill. Clause 4(4) provides, *inter alia*, that the Minister may, by notice in the Government Gazette, declare an organisation to be a proscribed organisation, if he or she is satisfied, on reasonable grounds that the declaration is reasonably appropriate to give effect to a decision of the Security Council of the United Nations that the organisation is an international terrorist organisation.

Question 4

The supplementary report makes reference, in relation to the transfer of funds for the financing of terrorism through charitable, religious or cultural organisations, to the action taken on information obtained on an *ad hoc* basis in respect of suspicious transfers. Is any legislation in force, or proposed, requiring the registration or audit of such organisations? In this connection, the CTC would welcome a progress report on the work of the South African Intelligence community that is mentioned in paragraph 4 of the comments in the supplementary report in relation to sub-paragraph 1 (d) of the Resolution.

Anti-Terrorism Bill

The Anti-Terrorism Bill criminalises participation in, contribution to, or facilitation of terrorist activities. The Bill also sets out that participating in, or contributing to the activities of a terrorist organisation includes collecting, providing or making available, directly or indirectly, property or inviting a person to provide, facilitate or make available property or financial or other related services on behalf of such an organisation.

The South African Intelligence Community continues to explore avenues to ensure that funds intended for the financing of terrorism are not transferred through charitable, religious or cultural organisations. Organisations identified as possibly having ties with terrorism are put under surveillance and investigated.

All allegations of terrorist-related activities are followed up. All information is gathered and analysed. A mechanism exists for a court directed investigation to be instigated. These matters are dealt with in terms of the Financial Intelligence Centre Act, 2001 (Act No 38 of 2001) which has the following provisions:

Quote

Section 28. Cash transactions above prescribed limit:

An accountable institution and a reporting institution must, within the prescribed period, report to the Centre the prescribed particulars concerning a transaction concluded with a client if in terms of the transaction an amount of cash in excess of the prescribed amount:

(a) is paid by the accountable institution or reporting institution to the client, or to a person acting on behalf of the client, or to a person on whose behalf the client is acting; or

(b) is received by the accountable institution or reporting institution from the client, or from a person acting on behalf of the client, or from a person on whose behalf the client is acting.

Section 29. Suspicious and unusual transactions:

(1) A person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or suspects that:

(a) the business has received or is about to receive the proceeds of unlawful activities;

(b) a transaction or series of transactions to which the business is a party:

(i) facilitated or is likely to facilitate the transfer of the proceeds of unlawful activities;

(ii) has no apparent business or lawful purpose;

(iii) is conducted for the purpose of avoiding giving rise to a reporting duty under this Act; or

(iv) may be relevant to the investigation of an evasion or attempted evasion of a duty to pay any tax, duty or levy imposed by legislation administered by the Commissioner for the South African Revenue Service; or

(c) the business has been used or is about to be used in any way for money laundering purposes must, within the prescribed period after the knowledge was acquired or the suspicion arose, report to the Centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions.

(2) A person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or suspects that a transaction or a series of transactions about which enquiries are made, may, if that transaction or those transactions had been concluded, have caused any of the consequences referred to in subsection (1)(a), (b) or (c), must, within the prescribed period after the knowledge was acquired or the suspicion arose, report to the Centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions.

Section 31. Electronic transfers of money to or from Republic:

If an accountable institution through electronic transfer sends money in excess of a prescribed amount out of the Republic or receives money in excess of a prescribed amount from outside the Republic on behalf, or on the instruction, of another person, it must, within the prescribed period after the money was transferred, report the transfer, together with the prescribed particulars concerning the transfer, to the Centre.

Section 72. Act not to limit powers of investigating authorities or supervisory bodies:

This Act does not detract from:

(a) an investigating authority's powers in terms of other legislation to obtain information for the purpose of criminal investigations.

Unquote

Nonprofit Organisations Act 71 of 1997

The registration and regulation of the activities of nonprofit or charitable organisations is set out in the Nonprofit Organisations Act 71 of 1997. Registration of these organisations is voluntary. The explanatory memorandum to the Nonprofit Organisations Bill explained that the Bill sought to complement attempts by government and other relevant stakeholders to create an enabling environment for nonprofit organisations, and the Bill attempted to bring legislation affecting nonprofit organisations into line with constitutional guarantees of free association and the general principle of encouraging a vibrant and accountable civil society.

The *Nonprofit Organisations Act* applies to nonprofit organisations that choose to subject themselves to the Act. The Act defines a nonprofit organisation as "a trust or association of persons — established for a public purpose; and the income and profits of which are not distributable to its members, or office-bearers directors, except as reasonable compensation for services rendered". In terms of this definition, the determinate factor is not the making of profit but rather its non-distribution. The Act imposes an obligation on the State to determine and co-ordinate its efforts in relation to nonprofit organisations.

The Act created a new system for administering nonprofit organisations by providing for a voluntary system of registration. It was considered that the voluntary system of registration comes with certain advantages, *viz.* it promotes the attraction of donor confidence and legitimacy; access to further benefits and allowances; and State recognition of the "nonprofit" sector. In exchange for these benefits, certain obligations were imposed on registered nonprofit organisations, *viz.* the keeping of proper books of account; the completion of a report by an accounting officer; and the submission of narrative reports and financial statements. According to section 18 of the Act, the narrative reports and financial statements must be provided annually to the Director of Nonprofit Organisations. According to section 8 of this Act, the Director of Nonprofit organisations is an employee of the national department responsible for welfare who is designated for this purpose by the Minister for Welfare and Population Development. The submission of reports and financial statements created mechanisms to ensure that a nonprofit organisation complies with its constitution and the Act. The Director of Nonprofit Organisations must also keep a register in the prescribed form of all nonprofit organisations that have been registered, all nonprofit organisations whose registrations have been cancelled, and all nonprofit organisations that have voluntarily deregistered or have been wound up or dissolved.

Income Tax Act 58 of 1962

Suspicious activities of nonprofitable or charitable organisations could come to light should they apply for tax exemption, as the receipts and accruals of public benefit organisations which have been approved by the Commissioner for the South African Revenue Service in terms of the Income Tax Act 58 of 1962 is exempt from tax. The Income Tax Act defines public benefit organisations as follows:

Quote

'Public benefit organisation' means any organisation:

a) which is a company formed and incorporated under section 21 of the Companies Act, 1973 (Act 61 of 1973), or a trust or an association of persons;

b) of which the sole object is carrying on one or more public benefit activities (including any undertakings or activities which are not prohibited under subsection (3)(b)(iv)), where:

   (i) all such activities are carried on in a nonprofit manner and with an altruistic or philanthropic intent;
   (ii) no such activity is intended to directly or indirectly promote the economic self-interest of any fiduciary or employee of the organisation, otherwise than by way of reasonable remuneration payable to that fiduciary or employee; and
   (iii) at least 85 per cent of such activities, measured as either the cost related to the activities or the time expended in respect thereof, are carried out for the benefit of persons in the Republic, unless the Minister, having regard to the circumstances of the case, directs otherwise; and

(c) Where:

   (i) each such activity carried on by that organisation is for the benefit of, or is widely accessible to, the general public at large, including any sector thereof (other than small and exclusive groups);
   (ii) each such activity carried on by that organisation is for the benefit of, or is readily accessible to, the poor and needy; or

(iii) that organisation is at least 85 per cent funded by donations, grants from any organ of state or any foreign grants.

Unquote

The *Income Tax Act* provides that, on the registration of nonprofit organisations, the Commissioner shall, for the purposes of the Act, approve a public benefit organisation which has, within such period as the Commissioner may determine, been registered in terms of section 13(5) of the *Nonprofit Organisations Act*, 1997, and complied with any other requirements imposed in terms of that Act, unless the Commissioner in consultation with the Director of Nonprofit Organisations on good cause shown, otherwise directs.

Following the reporting of any suspicious transaction, an investigation into the acquiring and distribution of the organisation's funds is done.

The most important problem faced by the Intelligence Community is the difficulty in investigating the money trail after a transaction has taken place. Once money has been transferred to a business/organisation or person outside South Africa, the further trail of those funds cannot always be followed.

Question 5

The CTC notes that 'South Africa does not have provisions for specifically regulating *hawala* money-transfer agencies'. Is there any provision in South African law having the effect of outlawing *hawala* transactions? The CTC would also welcome information on the controls that apply to non-bank money-transfer agencies such as 'wire services'.

The provisions of Regulation 3(1)(d) and Regulation 10(1)(c) of the Exchange Control Regulations have the effect of outlawing any unauthorised transactions and similar mechanisms, including *hawala*, in respect of all cross border transactions. *Hawala* transfers to known terrorist organisations and organisations supporting terrorist activities, would therefore not take place.

The United Nations Consolidated List issued pursuant to Security Council resolutions 1267 (1999), 1333 (2000) and 1390 (2002) is circulated to all relevant Government Departments and institutions for implementation as and when updated by the relevant Security Council Committee.

Regulation 3(1)(d)

Quote

Subject to any exemption which may be granted by the Treasury or a person authorised by the Treasury, no person shall, without permission granted by the Treasury or a person authorised by the Treasury and in accordance with such conditions as the Treasury or such authorised person may impose –

draw or negotiate any bill of exchange or promissory note, transfer any security or acknowledge any debt, so that a right (whether actual or contingent) on the part of such person or any other person to receive a payment in the Republic is created or transferred as consideration:

(i) for the receiving by such person or any other person of a payment or the acquisition by such person or any other person of property, outside the Republic; or

(ii) for a right (whether actual or contingent) on the part of such person or any other person to receive a payment or acquire property outside the Republic; or make or receive any payment as such consideration.

Unquote

Regulation 10(1)(c)

Quote

> No person shall, except with permission granted by the Treasury and in accordance with such conditions as the Treasury may impose enter into any transaction whereby capital or any right to capital is directly or indirectly exported from the Republic.

Unquote

In addition the *Anti-Terrorism Bill* provides that participating in or contributing to the activities of a terrorist organisation includes collecting, providing or making available, directly or indirectly, property or inviting a person to provide, facilitate or make available property or financial or other related services on behalf of such an organisation. Property is defined as follows in the Bill:

Quote

Property:

(1) means real or personal property of any description, and whether tangible or intangible; and

(2) includes an interest in any real or personal property; and

(3) includes funds, cash, assets or any other property, tangible or intangible, however acquired; and notably any type of financial resource, including cash or the currency of any State, bank credits, traveller's cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit or any other negotiable instrument in any form, including electronic or digital form; and

(4) includes any letter or document conferring or containing any evidence of rights in respect of any security.

Unquote

The effect of the provision on the making available of financial or other related services is to outlaw the use of *hawala* systems to transfer funds to terrorist organisations.

The FATF Working Group on Terrorist Financing will be meeting on 13 and 14 January 2003 to consider, among others, alternative remittance systems including *hawala*. It is anticipated that South Africa will be represented at this meeting.

There is currently not any regulated entity providing "wire services" that carries on the business as a "money remitter" for cross-border transactions in South Africa, other than "Authorised Dealers". This mechanism is detailed in paragraph 1 of South Africa's National Report (S/2001/1281).

Question 6

As indicated above, the CTC looks forward to further information on the content of, and progress with, the proposed Anti-Terrorism Bill. In that connection and in view of the remarks in the supplementary report with regard to the notions of 'preparation', it should be borne in mind that effective implementation of this paragraph requires States to criminalize the financing, planning, facilitating and committing of terrorist acts including, in particular, those directed against other states or their citizens. As regards acts of financing, planning and facilitating terrorist acts that are committed in South Africa, it is important to ensure that they are criminalized regardless of whether the related terrorist act is actually committed or attempted and, in the case of the collecting or contributing of funds within South Africa, whether any attempt, successful or otherwise, is made to transmit them to another country. Please comment on South Africa's approach to these points.

Clause 3 of the Anti-Terrorism Bill criminalises participation in and facilitation of terrorist acts. Clause 3 (1) provides, among others, that any person who "*does anything which will, or is likely to, enhance the ability of any terrorist organisation to facilitate or carry out a terrorist act*" is guilty of an offence.

This is a very wide provision and will include the planning of terrorist acts, or, of methods to facilitate terrorist acts. In terms of sub-clause (3) this phrase expressly includes "*collecting, providing or making available, directly or indirectly, property or inviting a person to provide, facilitate or make available property or financial or other related services on behalf of such an organisation*".

Clause 3 (2) of the Anti-Terrorism Bill makes it clear that the offence of participation in and facilitation of terrorist acts may be committed whether or not a terrorist organisation actually facilitates or carries out a terrorist act, the participation or contribution of the accused actually enhances the ability of a terrorist organisation to facilitate or carry out a terrorist act, or the accused knows the specific nature of any terrorist act that may be facilitated or carried out by a terrorist organisation.

Question 7

The CTC would welcome confirmation that the Anti-Terrorism Bill will include provisions dealing with 'deceptive recruitment', as described in the question relating to sub-paragraph 2 (b) in the letter of 15 April 2002.

Any form of recruiting and also *deceptive recruitment* is addressed in clause 3(3):

Quote

Without limiting the generality of subsection (1), participating in or contributing to the activities of a terrorist organisation includes providing, receiving or recruiting a person to receive training.

Unquote

This includes recruiting a person to collect funds on behalf of a terrorist organisation. Clause 3(1) deals with instances where any person **knowingly** participates in, or contributes to, the activities of a terrorist organisation or does anything which will, or is likely to, enhance the ability of any terrorist organisation to facilitate or carry out a terrorist act. Clause 1(2) and (3) also defines the term *knowledge* as follows:

Quote

(2) For the purposes of this Act a person has knowledge of a fact if:
- (a) the person has actual knowledge of that fact; or
- (b) the court is satisfied that:
  - (1) the person believes that there is a reasonable possibility of the existence of that fact; and
  - (2) the person fails to obtain information to confirm or refute the existence of that fact.

(3) For the purposes of this Act a person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached, are those which would have been reached by a reasonably diligent and vigilant person having both:

(5) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and

(6)the general knowledge, skill, training and experience that he or she in fact has.

Unquote

Question 8

The CTC would also welcome confirmation that, with the passage of the Anti-Terrorism Bill, it will be possible according to South African law to prosecute or extradite a foreign national who has committed a terrorist act outside South Africa against another state or its citizens and is found in South Africa, in order to fulfil the requirement of sub-paragraph 2 (e).

Clauses 14 and 15 of the Anti-Terrorism Bill address this issue as follows:

Quote

14(1) The Courts of the Republic shall have jurisdiction in respect of any offence referred to in this Act, if:

(a) the alleged perpetrator of the offence is arrested in the territory of the Republic, in its territorial waters or on board a ship registered in the Republic or an aircraft registered in the Republic; and

(b) the offence has been or is committed:
- (i) in the territory of the Republic, or committed elsewhere, if the act is punishable in terms of the domestic laws of the Republic, including this Act or in terms of the obligations of the Republic under international law;
- (ii) on board a vessel or a ship or fixed platform registered in the Republic or an aircraft which is registered under the laws of the Republic at the time the offence is committed;
- (iii) by a citizen of the Republic or a person ordinarily resident in the Republic;
- (iv) against a citizen of the Republic or a person ordinarily resident in the Republic;
- (v) outside of the Republic, and the person who has committed the act is, after the commission of the act, present in the territory of the Republic; or
- (viii) on board an aircraft in respect of which the operator is licenced in terms of the Air Services Act 1990 (Act No 115 of 1990) or the International Air Services Act 1993 (Act No 60 of 1993); or

(c) the evidence reveals any other basis recognised by law.

(2)Whenever the National Director receives information that there may be present in the Republic a person who is alleged to have committed an offence under the Act, the National Director must:
- (1) order an investigation to be carried out in respect of that allegation;
- (2) inform any other foreign State which might also have jurisdiction over the alleged offence promptly of the findings of the investigation; and
- (3) indicate promptly to other foreign States which might also have jurisdiction over the alleged offence whether he or she intends to prosecute.

(3) In deciding whether to prosecute, the National Director shall take into account:
- (1) considerations of international law, practice and comity;
- (2) international relations;
- (3) prosecution action that is being or might be taken by a foreign State; and
- (4) other public interest considerations.

(4) If a person has been taken into custody to ensure the person's presence for the purpose of prosecution or surrender to a foreign State in terms of section 15, the National Director must, immediately after the person is taken into custody, notify any foreign State which might have jurisdiction over the offence

concerned, and any other State the National Director considers it advisable to inform or notify either directly or through the Secretary-General of the United Nations, of:

(a) the fact that the person is in custody; and
(b) the circumstances that justify the person's detention.

(5) When the National Director declines to prosecute, and another foreign State has jurisdiction over the offence concerned, he or she must inform such foreign State, accordingly with the view to the surrender of such person to such foreign State for prosecution by that State.

Unquote

Question 9

Sub-paragraph 3 (g) calls upon States 'to ensure, in conformity with international law, … that claims of political motivation are not recognised as grounds for refusing requests for the extradition of alleged terrorists'. The supplementary report states that section 11 of the Extradition Act 'provides for refusal to extradite on, as one of the grounds "political opinion"' and that 'bilateral treaties do provide for refusal to extradite on political grounds'. The CTC would be grateful for an explanation of how South Africa proposes, in the light of those provisions, to meet the requirement of sub-paragraph 3 (g).

Extradition Act

The matters referred to in paragraph 1.10 of the Counter-Terrorism Committee's letter dated 30 October 2002 (S/AC.40/2002/MS/OC.181) are dealt with in sub-paragraph (b)(iv) of section 11 of the Extradition Act, 1962.

Section 11 of the Extradition Act, 1962 provides as follows:

Quote

Minister may order or refuse surrender to foreign state.

11. The Minister may:

(a) order any person committed to prison under section 10 to be surrendered to any person authorised by the foreign State to receive him or her; or
(b) order that a person shall not be surrendered:

(i) where criminal proceedings against such person are pending in the Republic, until such proceedings are concluded and where such proceedings result in a sentence of a term of imprisonment, until such sentence has been served;
(ii) where such person is serving, or is about to serve a sentence of a term of imprisonment, until such sentence has been completed;
(iii) at all, or before the expiration of a period fixed by the Minister, if he or she is satisfied that by reason of the trivial nature of the offence or by reason of the surrender not being required in good faith or in the interests of justice, or that for any other reason it would, having regard to the distance, the facilities for communication and to all the circumstances of the case, be unjust or unreasonable or too severe a punishment to surrender the person concerned; or
(iv) if he or she is satisfied that the person concerned will be prosecuted or punished or prejudiced at his or her trial in the foreign State by reason of his or her gender, race, religion, nationality or political opinion.

Unquote

It follows that a request for extradition cannot be refused on the basis of a claim that the offence, for which extradition is sought, was committed for political reasons. Sub-paragraph (b) (iv) of Section 11 of the Extradition Act only allows a discretionary power for the Minister to order that a person shall not be surrendered if the extradition request itself is made with a view to punish the fugitive because of, among others, his or her political opinion, or that the fugitive will be prejudiced at his or her trial because of these reasons.

The Minister's decision is taken at an executive level, as opposed to a judicial level, and is only taken after a court has found a person liable to be surrendered at an extradition hearing. This means that issues such as the provisions of Resolution 1373 (2001) of the UN Security Council will necessarily have to be taken into account by the Minister when exercising his or her discretion.

Furthermore Section 233 of the Constitution of South Africa provides as follows: *"When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".*

Section 39(1)(b) and (c) of the Constitution further provides that a court, tribunal or forum must consider international law and may consider foreign law when interpreting the Bill of Rights. Therefore, conventions on terrorism, which exclude political offence as a ground for refusing extradition, do form part of South African law.

Extradition will be refused if a person extradited will face a death penalty, unless the requesting State provides assurances that the death penalty will not be imposed, or, if imposed, will not be carried out. (See Mohamed and Another v President of the RSA and Others 2001(7) BCLR 685 (CC)).

It is the intention of the Department of Justice and Constitutional Development to review the Extradition Act to bring it in line with the Constitution and international standards.

The effect of the above provision is that the Extradition Act will not be read in isolation when a decision has to be taken.

Bilateral Treaties

Although bilateral treaties do provide for refusal to extradite on "political grounds', the following offences are, *inter alia,* specifically excluded,

Quote

(a) a murder or other violent crime against a Head of State or Deputy Head of State of the Requesting or Requested State, or of or against a member of such person's family;
(b) an offence for which both the Requesting and Requested States have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to their respective competent authorities for decision as to prosecution;
(c) murder;
*(d) **terrorism offences;***
(e) an offence involving kidnapping, abduction or any form of unlawful detention, including the taking of a hostage; and
(f) attempting or conspiring to commit, aiding, abetting, inducing, counselling or procuring the commission of, or being an accessory before or after the fact to such offences.

Unquote

Anti-Terrorism Bill

The fourth preambular paragraph of the Anti-Terrorism Bill specifically determines that claims of political motivation would not be recognised. It provides that terrorist acts are under any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them. This provision will also apply to requests for the extradition of terrorists.

Commonwealth London Scheme

It must be noted that at the 13th meeting of Commonwealth Ministers of Justice in St Vincent and the Grenadines from 18 to 23 November 2002, which was also attended by the South African Minister of Justice and Constitutional Development, in a unanimous agreement, Ministers took a major step by removing the political offence exemption from the London Scheme for extradition. This scheme provides a framework for extradition arrangements for all Commonwealth Countries. Once implemented in domestic law, this decision will further strengthen the legislative framework to remove the possibility of terrorists avoiding extradition by claiming their action was politically motivated.

Conclusion

It is clear from the above that South Africa will be in a position to satisfy the requirements of paragraph 3 (g).

Question 10

The CTC would welcome a progress report on the enactment of the amendments of the Civil Aviation Offences Act, 1972 for the purpose of giving full effect in South Africa to those of the relevant conventions that are relevant to compliance with the Resolution.

The proposed clause amending the Civil Aviation Offences Act is contained in the Schedule to the Anti-Terrorism Bill and will therefore be dealt with as part of the Bill.

2. Assistance and guidance

Question 11

The CTC is eager to facilitate the provision of assistance and advice in connection with the implementation of the Resolution. It encourages the Government of South Africa to inform the CTC of any areas in which assistance or advice might be of benefit in taking forward the implementation of the Resolution in South Africa, or of any areas in which South Africa might be in a position to offer assistance or advice to other States on the implementation of the Resolution. The CTC maintains a Directory of Information and Sources of Assistance in the field of Counter-Terrorism on which all relevant information on available assistance is posted. It can be found on the CTC's website (www.un.org/sc/ctc). The CTC's Technical Assistance Team is available to discuss any aspect of the provision of assistance and can be contacted as in paragraph 3.1, below.

The South African authorities encounter difficulties in following the trail of financial transactions once money is transferred to another country. These difficulties impact negatively on court-directed investigations into the transactions, because of the inability in certain circumstances, for the investigating authorities to either conduct investigations in such third countries, or to establish contact with reliable officials in those countries who could pursue the investigations and provide the necessary information.

International co-operation and assistance in identifying reliable contact persons in the relevant investigative agencies in third countries would significantly enhance the ability of the South African authorities to follow up such investigations.

For such investigations to result in successful prosecutions in South Africa, it is necessary for the court-required information to be collected by experienced and knowledgeable officials and must also be gathered in accordance with the evidentiary requirements of the specific court where the case will be heard.

Question 12

The CTC notes that there is no mention in the reports submitted by South Africa of areas in which it might be in a position to provide assistance to other States, and particularly those in its region, in connection with the implementation of the Resolution.

South Africa has to date provided assistance to other States in the context of its active participation in multilateral fora. For example, South Africa is active in the Southern African Police Chiefs Co-operation Organisation (SARPCCO) which has Legal and Operational Subcommittees, in which issues such as anti-terrorism legislation, firearms, explosives and other related issues are addressed.

South Africa also actively participated in the African Union High-Level Inter-Governmental Meeting on the Prevention and Combating of Terrorism in Africa held in Algiers from 11-14 September 2002.

South Africa more recently participated, as facilitator, in a workshop in Gaborone, hosted by the Commonwealth Secretariat from 4 to 8 November 2002, and attended by 13 Southern and Eastern African countries, to consider legislative measures to combat terrorism and implement Security Council resolution 1373 (2001). Legislative action that has been taken in other Commonwealth jurisdictions such as Mauritius and the South African proposed Anti-Terrorism Bill as well as the Commonwealth Model Legislative Provisions on Measures to Combat Terrorism were considered during the workshop.

At this stage the CTC will be focusing on requests for assistance that relate to 'Stage A' matters. However, the assistance to be provided by one State to another on any aspect of the implementation of the Resolution is a matter for agreement between them. The CTC would be grateful to be kept informed of any such arrangements and on their outcome.

The South African Government will inform the CTC of any bilateral arrangements regarding assistance on "Stage A matters" as and when they take place.